



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2011-0501; FRL-9655-4]

**Approval and Promulgation of Air Quality Implementation Plans;
Wisconsin; Forest County Potawatomi Community Reservation Class I
Area**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On May 12, 2011, the Wisconsin Department of Natural Resources (WDNR) submitted provisions affecting the Forest County Potawatomi Community (FCP Community) Class I Area for approval into the Wisconsin State Implementation Plan (SIP). The provisions include the regulation of sources constructing near the newly designated Class I Area, as well as procedures that the FCP Community must follow when providing a demonstration regarding a source that may have an adverse impact on the Class I Area. In this action, EPA proposes to approve the provisions into Wisconsin's SIP.

DATES: Comments must be received on or before **[insert date 30 days after publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R05-OAR-2011-0501, by one of the following methods:

1. www.regulations.gov: Follow the on-line instructions for submitting comments.
2. E-mail: damico.genevieve@epa.gov.
3. Fax: (312) 582-5146.
4. Mail: Genevieve Damico, Chief, Air Permits Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. Hand Delivery: Genevieve Damico, Chief, Air Permits Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 AM to 4:30 PM, excluding Federal holidays.

Instructions: Direct your comments to Docket ID No.

EPA-R05-OAR-2011-0501. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The

www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of the SUPPLEMENTARY INFORMATION section of this document.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in

hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 AM to 4:30 PM, Monday through Friday, excluding Federal holidays. We recommend that you telephone Danny Marcus, Environmental Engineer, at (312)353-8781 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Danny Marcus, Environmental Engineer, Air Permits Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-8781, marcus.danny@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

- I. What Should I Consider as I Prepare My Comments for EPA?
- II. Background
- III. What Changes Is EPA Proposing to Approve?
- IV. What Action is EPA Taking?
- V. Statutory and Executive Order Reviews.

I. What Should I Consider as I Prepare My Comments for EPA?

1. Follow directions - EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

2. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
3. Describe any assumptions and provide any technical information and/or data that you used.
4. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
5. Provide specific examples to illustrate your concerns, and suggest alternatives.
6. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
7. Make sure to submit your comments by the comment period deadline identified.

II. Background

Redesignation of the Forest County Potawatomi Community

On April 29, 2008, at 73 FR 23086, the Administrator granted the application of the FCP Community to obtain Class I redesignation of certain reservation lands from "Class II" to "Class I" under the Clean Air Act's (CAA) Prevention of Significant Deterioration (PSD) Program. This rulemaking redesignated to Class I status lands held in trust for the FCP Community. At the same time, EPA published two actions resolving disputes with Wisconsin and Michigan under the CAA, in which those states had challenged the FCP Community's application for

Class I redesignation. The history of these dispute resolutions is discussed in detail in EPA's April 29, 2008, actions for the resolution of these two matters at 73 FR 23107 and 73 FR 23111. The dispute resolution reached by Wisconsin and the FCP Community was formalized in a Memorandum of Agreement (MOA) which was signed in 1999.

The FCP Community and the State of Wisconsin Memorandum of Agreement

The 1999 MOA provided a framework for establishing how the State and FCP Community would implement the Class I Area under their respective authorities. The provisions of the agreement became effective upon EPA's final action to approve the FCP Community's request for Class I redesignation. While EPA also was a signatory to the agreement, EPA's role in the process was to acknowledge the agreement entered into by the parties on their own respective authorities.

Section 164(e) of the CAA, provides that "If the [state and the Indian Tribe] do not reach agreement, the Administrator shall resolve the dispute and his determination or the results of the agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan." CAA section 164(e), 42 U.S.C. 7474(e). The PSD program is implemented in Wisconsin under an EPA approved SIP that excludes all of Indian country within the State. Because the terms of the

MOA set out requirements for sources locating outside the Class I Area, it is appropriate to implement these requirements through the SIP which applies to all areas excluding Indian country in Wisconsin. 73 FR 23114. These revisions are the subject of today's proposal.

Pursuant to the MOA, all major sources in Wisconsin that are located within a 10-mile radius of any redesignated FCP land must perform a Class I increment analysis and must meet the increment consumption requirements applicable to a Class I Area. Major sources located beyond the 10-mile distance from redesignated lands must perform a Class II increment analysis and comply with the consumption requirements applicable to a Class II Area. Additionally, all major sources within 62 miles of the FCP Community's Class I redesignated area must determine by an analysis whether their emissions will have an adverse impact on those Air Quality Related Values (AQRV) associated with that Class I Area.

EPA takes the position that it generally will not interfere with the agreements reached between tribes and states through the CAA's section 164(e) dispute resolution process. However, to the extent that the agreement reached under the terms of the MOA allows for restricting the requirements normally associated with Class I areas as these apply to sources located outside a 10-mile radius of the redesignated reservation lands, EPA takes the

position that a revision of the Wisconsin SIP is necessary to implement these provisions for potential sources located outside the boundaries of the redesignated parcels. In the absence of such modification to the Wisconsin SIP, the current PSD rules will apply to sources locating outside the Class I Area, and the provisions of the MOA would lack enforceability.

Between 2008 and 2010, representatives from the FCP Community, WDNR, and EPA met and held discussions to determine how to translate the general principles of the MOA into implementable regulations. These discussions covered definition of the areas within which sources would be required to conduct the Class I and Class II increment analyses, notification procedures, and a state-tribal dispute resolution mechanism. Representatives for the FCP Community and WDNR then worked together to develop the necessary regulatory provisions.

III. What Changes Is EPA Proposing to Approve?

The regulatory revisions that Wisconsin has submitted for EPA's approval include defining the geographic center of the FCP Community Class I Area for purposes of air quality management. Additionally, proposed new major sources or major modifications of existing sources locating within 22.25 miles of the geographic center of the FCP Community Class I Area must conduct a Class I increment analysis and are subject to Class I consumption limits. Proposed new major sources or major modifications of existing

sources locating outside 22.25 miles of the geographic center of the FCP Community Class I Area must conduct a Class II increment analysis and are subject to Class II consumption limits. The rules also include procedures for the FCP Community to coordinate with the state regarding comments on sources potentially impacting the Class I Area and to make a demonstration to the state that a proposed source may have an adverse effect on AQRVs. Finally, the rules provide the FCP Community with the opportunity to review certain best available control technology (BACT) and maximum achievable control technology (MACT) determinations made by the State, and provide a dispute resolution mechanism for resolving disagreements regarding BACT or MACT determinations for certain new or modified sources. The rules proposed for approval are as follows:

NR 400.02 (66m) "Forest County Potawatomi Community Class I Area" or "FCPC Class I Area"

Means those land parcels of the Forest County Potawatomi Reservation that are designated as a non-Federal Class I Area by EPA under 40 CFR 52.2581. The FCP Community Class I Area has a geographic center, as determined by the department, at latitude 45.49978° N, longitude 88.64377° W.

NR 405.19 "Forest County Potawatomi Class I Area."

(1) For any new major source or major modification of an existing source, the FCP Community shall have the opportunity to present

to the department, within no more than 75 days of receipt of a complete permit application by the department, a demonstration that the emissions from the proposed new major source or major modification would have an adverse impact on the established air quality related values of the FCP Community Class I Area.

(2) New major sources or major modifications of existing sources wholly or partially locating or located within a radius of 22.25 miles from the geographic center of the FCP Community Class I Area, as identified in s. NR 400.02 (66m), are subject to an increment analysis and limited to the maximum allowable increase levels of a Class I Area.

(3) New major sources or major modifications of existing sources locating or located wholly outside the area defined in sub. (2) are subject to an increment analysis and maximum allowable increase levels of a Class II Area.

NR 406.08 "Action on permit applications."

(4)(a) The FCP Community shall have the opportunity to review BACT or MACT determinations made by the department for any new or modified source that is either of the following:

1. Wholly or partially locating or located within a radius of 22.25 miles from the geographic center of the FCP Community Class I Area, as identified in s. NR 400.02 (66m).
2. Wholly or partially locating or located within 62 miles of the FCP Community Class I Area, and has a modeled impact exceeding 1

microgram per cubic meter averaged over any 24-hour period for mercury or for any regulated pollutant that has an ambient air quality standard in s. NR 404.04.

(b) Disagreements between the department and the FCP Community regarding BACT or MACT determinations are subject to dispute resolution but the department shall act on a permit application according to time period requirements under ss. 285.61 and 285.62, Stats.

IV. What Action is EPA Taking?

EPA is proposing to approve Wisconsin's May 12, 2001, submittal, relating to provisions impacting the FCP Community Class I Area. Specifically, Wisconsin's submittal defines the geographic center of the FCP Community Class I Area, establishes requirements for sources which may potentially impact the FCP Community Class I Area, provides the FCP Community the opportunity to review certain BACT and MACT determinations, and establishes a dispute resolution process for issues that may arise between the FCP Community and the State. The provisions proposed for approval into Wisconsin's SIP include: NR 400.02(66m), NR 405.19, and NR 406.08(4).

EPA has made the preliminary determination that the SIP submittal is approvable because EPA takes the position that it generally will not interfere with the agreements reached between Tribes and States through the CAA's section 164(e) dispute

resolution process, which provides that the results of such agreements will become part of the appropriate applicable plan. EPA's 2008 rulemaking anticipated that revisions to the Wisconsin SIP would be needed to fully implement the 1999 MOA between the State and the FCP Community.

V. Statutory and Executive Order Reviews.

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal

law. In May 2011, EPA issued its policy on consultation and coordination with Indian tribes. EPA explained that its policy is to consult on a government-to-government basis with Federally recognized tribal governments when EPA actions and decisions may affect tribal interests. Accordingly, EPA engaged in consultation with the FCP Community regarding the Wisconsin proposed SIP revisions.

The Wisconsin proposed SIP revisions which define the FCP Community's Class I Area, and which define those sources that are required to conduct Class I and Class II increment analysis, and which provide for the FCP Community's participation in certain BACT or MACT determinations will all enable the FCP Community and Wisconsin to work together to cooperatively implement the FCP Community's Class I Area, which is an integral part of the FCP Community's goal of exercising control over reservation resources to better protect the members of the FCP Community.

In the process of reviewing the proposed Wisconsin SIP revisions, EPA consulted with FCP Community tribal officials to permit them to have meaningful and timely input into the Agency's review. EPA consulted with representatives of the FCP Community prior to proposing to approve the Wisconsin SIP revision. During this consultation, EPA explained the provisions included in the proposed Wisconsin SIP revision and answered questions. EPA intends to keep the FCP Community informed of the progress of

this proposed SIP approval.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds.

Dated: March 26, 2012.

Susan Hedman,
Regional Administrator, Region 5.

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